

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

|                                       |   |                             |
|---------------------------------------|---|-----------------------------|
| In the Matter of                      | ) |                             |
|                                       | ) | File Number: EB-06-DL-095   |
| Jerry Russell dba The Russell Company | ) |                             |
|                                       | ) | NAL/Acct. No.: 200732500002 |
| Licensee of Station KWRD              | ) |                             |
| Henderson, Texas                      | ) | FRN: 0009607078             |
| Facility ID # 71519                   | ) |                             |

**MEMORANDUM OPINION AND ORDER**

**Adopted: May 15, 2007**

**Released: May 17, 2007**

By the Assistant Chief, Enforcement Bureau:

**I. INTRODUCTION**

1. In this *Memorandum Opinion and Order* (“*Order*”), we dismiss the Petition for Reconsideration filed by Jerry Russell dba The Russell Company, licensee of AM Broadcast Radio station KWRD, in Henderson, Texas. Mr. Russell seeks reconsideration of the *Forfeiture Order*<sup>1</sup> in which the Enforcement Bureau (“Bureau”) found him liable for a monetary forfeiture in the amount of eight thousand dollars (\$8,000) for willful and repeated violation of Section 11.35(a) of the Commission’s Rules (“Rules”).<sup>2</sup> The noted violation involves Mr. Russell’s failure to ensure the operational readiness of station KWRD’s Emergency Alert System (“EAS”). For the reasons provided below, we dismiss Mr. Russell’s petition for reconsideration as untimely.

**II. BACKGROUND**

2. On June 7, 2006, an agent from the Commission’s Dallas Office of the Enforcement Bureau (“Dallas Office”) conducted an inspection at the main studio of station KWRD located in Henderson, Texas. No employees of Mr. Russell were present at the station. On January 31, 2006, Mr. Russell signed a Time Brokerage and Option Agreement (“Agreement”) with a third party (“Broker”). The Agreement allowed Broker to use the station’s facilities to broadcast programming at the station for up to 24 hours a day, seven days a week, but reserved two hours of programming each week for Mr. Russell. Broker and Broker’s staff were present during the inspection. Broker stated that the EAS equipment had not been operational for “quite awhile.” He further clarified that the EAS system had not been functional since he had been at the station; over three months. The agent observed that a red fault light was illuminated on the front panel of the EAS encoder/decoder. Additionally, the most recent station EAS log entry dated “6/23/05” simply stated “E.B.S. OK.”<sup>3</sup> No entries were made in the log by Mr. Russell or Broker staff to identify the date or cause of the EAS system failure, or the steps taken to

<sup>1</sup> *Jerry Russell dba The Russell Company*, 22 FCC Rcd 48 (South Central Region, Enf. Bur. 2007) (“*Forfeiture Order*”).

<sup>2</sup> 47 C.F.R. § 11.35(a).

<sup>3</sup> The Emergency Broadcast System (“EBS”) predates EAS.

remedy any failures.

3. On November 14, 2006, the Dallas Office issued a *Notice of Apparent Liability for Forfeiture* to Mr. Russell in the amount of eight thousand dollars (\$8,000) for the apparent willful and repeated violation of Section 11.35(a) of the Rules.<sup>4</sup> On December 15, 2006, Mr. Russell submitted a timely response to the *NAL* requesting a reduction or cancellation of the proposed forfeiture. Mr. Russell argued that his violation was inadvertent and not willful, because the violations occurred unbeknownst to him. He claimed his station's EAS was operational before he entered into the Agreement and that Broker failed to notify him of the EAS status. Mr. Russell did not dispute that the violation was repeated.

4. The Bureau affirmed the *NAL* in the *Forfeiture Order*, stating that "Russell, as the licensee, is responsible for ensuring compliance with the Rules, and consciously allowed its employees and Broker to operate its radio station. Russell cannot absolve itself of liability by claiming it was unaware of the actions and inactions of those employees and Broker." Mr. Russell filed a petition for reconsideration of the *Forfeiture Order*, which the Commission received on February 20, 2007.

### III. DISCUSSION

5. Section 405 of the Communications Act of 1934, as amended ("Act")<sup>5</sup> requires that a petition for reconsideration of a Commission action or an action by delegated authority must be filed no later than 30 days after the action that is the subject of the appeal. Once it has made public notice of the action pursuant to Section 1.4 of the Rules,<sup>6</sup> the Commission loses jurisdiction to consider an appeal after 30 days have passed. Section 1.106 of the Rules reflects this statutory mandate.<sup>7</sup>

6. Mr. Russell did not timely file his petition for reconsideration of the *Forfeiture Order*. The *Forfeiture Order* was released and placed on public notice on January 5, 2007.<sup>8</sup> The thirtieth day after January 5, 2007 was February 4, 2007 (a Sunday). Mr. Russell's petition for reconsideration was therefore due on February 5, 2007.<sup>9</sup> His petition for reconsideration was not received by the Commission until February 20, 2007.<sup>10</sup> After February 5, 2007, pursuant to the Act, the Commission has no jurisdiction to consider Russell's petition for reconsideration.<sup>11</sup> Accordingly, we must dismiss Mr.

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<sup>4</sup> *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200732500002 (Enf. Bur., Dallas Office, November 14, 2006) ("*NAL*").

<sup>5</sup> 47 U.S.C. § 405(a).

<sup>6</sup> 47 C.F.R. § 1.4.

<sup>7</sup> 47 C.F.R. § 1.106(f).

<sup>8</sup> *Daily Digest*, Vol. 26, No. 3, January 5, 2007.

<sup>9</sup> 47 C.F.R. § 1.4(j) provides that, when the calculated filing date falls on a "holiday," the document is due to be filed on the next business day. 47 C.F.R. § 1.4(e)(2) defines the term "holiday" as "Saturday, Sunday, officially recognized Federal legal holidays and any other day on which the Commission's offices are closed and not reopened before 5:30 p.m."

<sup>10</sup> Mr. Russell's petition for reconsideration was dated February 10, 2007 and postmarked February 13, 2007. Thus, it was written and mailed after the petition was due.

<sup>11</sup> *Reuters Ltd. v. FCC*, 781 F. 2d 946, 951 (D.C. Cir. 1986); *National Black Media Coalition v. FCC*, 760 F. 2d 1297, 1299-1300 (D.C. Cir. 1985, Scalia, J.) (FCC has no jurisdiction to consider an appeal after 30 days have passed from date of public notice, distinguishing *Gardner v. FCC*, 530 F. 2d 1086 (D.C. Cir. 1976)).

Russell's petition for reconsideration as untimely.<sup>12</sup>

7. Assuming *arguendo* that Mr. Russell's petition was timely filed, we would nevertheless deny it. Mr. Russell's petition raises additional circumstances, which were not submitted in the response to the NAL, but these facts do not justify cancellation or reduction of the forfeiture. It is irrelevant whether the station's EAS was working prior to entering into the Agreement, because there was no evidence that the equipment was working between January 31, 2006 and the inspection on June 7, 2006.<sup>13</sup> It is also irrelevant that Mr. Russell employed someone to monitor the station on a daily basis, who failed to notify him of the problems with the EAS, because the "Commission has long held that licensees and other Commission regulatees are responsible for the acts and omissions of their employees and independent contractors,"<sup>14</sup> and the Commission has "consistently refused to excuse licensees from forfeiture penalties where actions of employees or independent contractors have resulted in violations."<sup>15</sup> Moreover, Mr. Russell's illness does not provide grounds for cancellation of the violation. Finally, Mr. Russell asserts that the forfeiture would pose a serious hardship, but he failed to include any documentation of the station's finances. Therefore, we are unable to determine whether a reduction based on inability to pay is warranted.

#### IV. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED** that, pursuant to Section 405(b) of the Communications Act of 1934, as amended, and Section 1.106(f) of the Commission's Rules,<sup>16</sup> the petition for reconsideration filed by Jerry Russell dba The Russell Company **IS DISMISSED**.

9. Payment of the forfeiture assessed by the *Forfeiture Order* shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.<sup>17</sup> Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank /LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106. Requests for payment of the full amount of the NAL under an installment plan should be sent to: Associate Managing Director – Financial Operations, 445

<sup>12</sup> *Metromedia, Inc.*, 56 FCC2d 909 (1975) (Commission may not waive 30 day filing period to accept a petition for reconsideration filed one day late); *Mobile Telephone, Inc.* 91 FCC 2d 907 ¶¶ 4-5 (1982); *Nextel Communications, Inc.*, 13 FCC Rcd. 281, 283 ¶ 6 (Wireless Telecom. Bur. 1998).

<sup>13</sup> We note that there was no evidence at the station that the EAS was operational after June 23, 2005.

<sup>14</sup> *Eure Family Limited Partnership*, Memorandum Opinion and Order, 17 FCC Rcd 21861, 21863,-64, para. 7 (2002); *MTD, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 34 (1991)(holding that a company's reliance on an independent contractor to construct a tower in compliance of FCC rules does not excuse that company from a forfeiture); *Wagenvoord Broadcasting Co.*, Memorandum Opinion and Order, 35 FCC 2d 361 (1972) (holding a licensee responsible for violations of FCC rules despite its reliance on a consulting engineer); *Petracom of Joplin, L.L.C.*, 19 FCC Rcd 6248 (Enf. Bur. 2004) (holding a licensee liable for its employee's failure to conduct weekly EAS tests and to maintain the "issues/programs" list).

<sup>15</sup> *American Paging, Inc. of Virginia*, Notice of Apparent Liability for Forfeiture, 12 FCC Rcd 10417, 10420, para. 11 (Enf. & Cons. Inf. Div., Wireless Tel. Bur. 1997) (quoting *Triad Broadcasting Company*, 96 FCC 2d 1235, 1244 (1984).

<sup>16</sup> 47 C.F.R. § 1.106(f).

<sup>17</sup> 47 U.S.C. § 504(a).

12<sup>th</sup> Street, S.W., Room 1A625, Washington, D.C. 20554.<sup>18</sup>

10. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class and Certified Mail Return Receipt Requested to Jerry Russell dba The Russell Company at his address of record.

FEDERAL COMMUNICATIONS COMMISSION

George R. Dillon  
Assistant Chief, Enforcement Bureau

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<sup>18</sup> See 47 C.F.R. § 1.1914.